United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

74-2675

To be argued by:

LAWRENCE STERN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

FREDDIE HILTON,

Defendant/Appellant.

----------x

Docket No. 74-2675

SUPPLEMENTAL BRIEF FOR APPELLANT

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UNITED STATES OF AMERICA,

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ISSUE PRESENTED

Whether the government's suppression of evidence of Avon White's motives, state of mind and lies at or about the time of trial, which evidence reveals a present and repeated pattern of fakery and psychotic behavior and trade-off of testimony against appellant in order to gain favorable prison conditions, desperation over continued incarceration in State prison and desperate dependency on the government's promise of transfer to federal detention and consequent willingness to give testimony he knew was coveted by the government, requires a new trial.

STATEMENT OF FACTS

While writing their response to appellant's brief on appeal filed in this Court, the government "learned" that a letter had been written to the trial prosecutor by the government's chief witness at trial, Avon White, and that this letter had never been revealed to defense counsel (See letter to this Court from AUSA Stephen Behar dated 2/27/75). The letter from White stated:

> Attn: Mr. Clarey
>
> I am writing you this letter to see if there is any way possible that you can have me moved from Ossining Correctional Facility to another institution because I am being held in solitary confinement and I am on the verge of having a nervous break down and I am desperately in the need of your help, Mr. Clarey. I know that this matter is out of your hands but I would really appreciate it if you would get together with the People concerned. I have been very cooperative with the government and as you know I am ready to go with you this time on the government vs. Hilton and I will continue to do so as long as I know that people are trying to help me. I won't let you down when you need me so don't let me down now cause I really need you now please help me.
>
> Sincerely yours,
>
> s/AVON WHITE 74608

This Court remanded the case to the District Court for a hearing to determine whether a new trial was necessary to permit a full and fair defense cross-examination of White on the basis of the letter. Non-adversary proceedings were held by the District Court on April 10, 1975, the Court refusing Mr. Hilton a continuance to permit the appearance of his trial counsel, Robert Bloom, who was actually engaged in a trial in State Supreme Court in the case of People v. Torres on that day. The government

produced the following testimony unsubjected to cross examination.

Robert L. Clarey was the Assistant United States Attorney who prosecuted at the Hilton trial. He is no longer with the office. He remembered that Avon White testified before the Grand Jury in the Hilton case in January, 1974, and that the indictment was returned shortly thereafter, and that shortly after that he received the letter from White dated February 8, 1974. He wrote on the letter, "file United States v. Hilton" and left the letter for his secretary to file in the single file the office kept on the Hilton case. He didn't respond to the letter, nor did he do anything else about it. The only thing he would have done is call the case agent, McCartin, but he didn't recall doing that. He looked in the case file prior to trial, but he didn't recall seeing the letter. Because, "it never occurred to [him] to turn it over," he did not inform the defense about it (minutes of 4-10-75 at 23). He did prepare to turn over, what the District Court characterized as, "five pounds" of transcripts of White testimony at prior trials (26-27), a substantial portion of which Mr. Bloom already had (9-28).*

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* Although reference was made to the trial discussion of these transcripts and 3500 material which discussion took place immediately after the opening statements at trial, omitted from the hearing testimony was reference to certain other colloquy which also took place at that time, and later on in the trial.

MR. CLAREY:... That's all I have, as long as you indicate you already have it.

MR. BLOOM: May I ask, is there no other statements, say, on the 26th of September of 1973?

(footnote continued on Page 4)

Peter Truebner was an Assistant United States Attorney in the Southern District of New York in February, 1974. He is no longer. He had had substantial dealings with White, as the prosecutor in the two Chesimard trials in the Southern District. In February, when he also received a letter almost exactly like the letter received by Clarey, White was due to give testimony in future State and federal trials. Truebner contacted an Assistant DA in the Bronx named Gelb and told Gelb that White was unhappy in solitary, that White was a "gregarious man" and that his circumstances ought to be changed (35) . Gelb replied that White had to stay in Sing Sing to be available for testimony in a Bronx trial and that segregation was necessary to White's safety. Truebner also contacted White's attorney, John Curley and "explained the program" to Curley, who recognized "the program" but thought it best that White remain in segregation (37). Truebner did not know whether there was any difference between "solitary confinement",the word used by White in his letter, and

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(footnote continued from p. 3) --

MR. CLAREY; 26th? If there is, I am not aware of it. I'll check on it... [9/17/73 FBI Interview] is the only report of interview I have. I'll check to see if there are others before, and get them to you, if there are, before Mr. White is cross-examined.

MR. BLOOM: OK

MR. CLAREY: But so far as I know, that is it.
(Trial at 170)

MR. CLAREY: I wrote a letter to Mr. White which sets forth exactly my and his understanding of any agreement he has at present. It is dated July 12, 1974. I will be glad to give a copy to Mr. Bloom at this time. I meant to give it to him before but I forgot.

(322-323)

"segregation".

On February 19, Truebner wrote to White, he "sympathized with his predicament but... believed that nothing could be done at this time." (39) *

Truebner put White's letter in a file called United States v. Rivers, which was included in a larger file drawer labelled, "BLA, Chesimard et al." He saw White again in April, 1974, just to say "hello" and introduce White to AUSA Hemley who would be prosecuting the Kearney case. White told Truebner at that time that he was still in solitary at Sing Sing. (33-42)

Agent Robert M. McCartin never received a phone call from AUSA Clarey about the White letter, but he did visit White at Sing Sing "prior to trial," on "a social visit as opposed to an official visit". (44-45)

Avon White wrote the letters to Clarey and Truebner. Agent McCartin told White, during a visit to Sing Sing prison prior to trial, that Clarey had received the letter.

He wrote the letters because, in his words,

> I wanted them to see, if they could push my sentence forward so I could get out of there.... only time I could come by myself was once a day, for one hour, you know, and I felt I was being punished for something. (53)

Denying at first that he had written he was on the verge of a nervous breakdown, when confronted with the letter, White

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*Actually, Truebner wrote, "We are.... actively trying to find a solution. In this connection, we have contacted both your Attorney and the District Attorney's office in the Bronx to see if other arrangements can be made. We certainly have not forgotten you and hope to be able to report some progress in the near future."

testified that "nervous breakdown" meant, "I was constantly in myself for a period of 23 hours a day. And I couldn't get no kind of -- no kind of privileges or nothing." (56-57)

White stayed in solitary for his entire sixteen months at Sing Sing, from October 16, 1973 through February 14, 1975. He suffered no ill affects, except inconvenience. He did not see other State or government witnesses, rather, "it's for disciplinary reasons also have guys down there for that." (52)

When White testified at the trial, he remembered the letter, but thought that the government could not do anything while he was in State custody (47-47).

This concluded the testimony at the April 10 proceedings, upon which, in addition to "everything that happened in the case in chief" (29), the District Court rendered a decision of May 2, 1975, denying a new trial.

At trial, defense counsel had cross-examined White about White's transfer from Comstock Prison to Matteawan State Hospital in 1968. Counsel elicited from White that White lied and faked insanity in order to effect the transfer, but that at the same time, he also believed as true the statements to the doctors which formed the basis of their diagnosis of insanity. White testified that he had wanted a transfer out of Comstock because it was not the place for him, and he "faked insanity" to do it; Matteawan was not a prison and he preferred to go there (trial at 269, 276,281).

> By going and faking insanity, my reason was... I was 16 years old and I was in... a maximum security prison.... with hardened criminals that... was beating on me... and people in there which was trying to.... take my manhood from me... And I was not about to... stay there under them conditions. (305)

White also testified that he believed at the time that he was God, that he wanted to kill fellow inmates. that he was smarter than the doctors and would have to kill them, that he was both the spouse and child of Allah, and that he would destroy the world (270-75, 277-78, 284, 308-09, 310). White explained, however, that this Matteawan-Comstock episode was confined to his past, and he testified he no longer believed these things, and he no longer would lie to gain a transfer from jail. The government was permitted to introduce a Matteawan document certifying White's recovery from the "psychotic episode" in 1969 (383). Counsel attempted to find out if his present mental state was anything like that in 1968.

Q: As you sit there now, as a witness in a trial, is it fair to say you would do almost anything to avoid getting yourself in a similar situation again?

A: No, sir. I would not do anything.

Q: Are there things you wouldn't do? Would you lie?

A: No, sir. I would not.

(306-307)

Q: Did you believe it to be the truth when you told them you could destroy the world?

A: Yes.

Q: Do you believe that now?

A: No.

Q: When did you stop believing that?

A: When I grew up... when I got out of Comstock...

Q: What does growing up mean to you?

A: ... when I realized, you know, that that stuff I was talking and at that time, you know, was a fantasy...

(310-312)

Counsel attempted to question White further about his present mental state, i.e. was he attempting to fool people these days as he had then (313-316), or was he still insane as he had been then (297-299). The Court precluded the defense introduction of the 1968 staff diagnosis of insanity, although the court permitted the government introduction of the report that White was cured. White testified that at the time of trial he was getting Valiums from a nurse at Sing Sing, but only to calm himself down. He had asked for them, but the only things troubling him were the ultimate sentences he faced (241-242).

Counsel also attempted to elicit from White the full extent of his understandings with the government, but, despite the letter and Truebner's response, White always insisted his only considerations were the federal and Bronx pleas to cover outstanding indictments against him.

> .... what is your understanding, what is your complete understanding as to what your guilt plea is covering, what the United States Attorney and the Bronx DA or any other law enforcement prosecutor will do for you or say for you?
>
> (319-320)

One of the three bank robberies for which he would not be prosecuted was added to the deal four to five months prior to the trial, i.e. in February or March, 1974, the same time that White sent the letter to the prosecutors. This was the promise not to prosecute for the Cambria Heights bank robbery. A letter of March 28, 1974, from AUSA Hemley to defense attorneys Berman and Ratner, outlining the White agreements, did not include the Canbria Heights bank, but a letter from AUSA Clarey, dated July, 1974, did contain that agreement (322-326).

Counsel also attempted to examine the lengths to which White would go, and the lengths White thought necessary, to secure the government's help.

Q: Is it in your mind that you have to please the people, that if you went out and said Fred Hilton didn't have anything to do with this bank robbery, that would affect your sentence?

A: I understand to the effect I am not performing as you said, I am not performing anything. You know.

THE COURT: Do you feel that if you said Freddie Hilton was not in this bank robbery it would go hard on you...

A: No. I feel they will be hard on me if I said that he was there and he wasn't.

(339)

Q:...Do you think that would ultimately hurt you in terms of a heavier sentence?

A: I would be charged with perjury.

(340)

Q:...What you say in Court or don't say in Court, does that in your mind, do you think that will affect your sentence in the two cases?

A: No.

(342)

THE COURT: .... Don't you think that the prosecutor would be more helpful to you if you said Fred Hilton was the driver than if you said that he was not the driver?

A: Yes.

(345)

Q: Isn't it a fact Freddie Hilton didn't have anything to do with the robbery, and they brought up the name and you gave it because you thought they wanted to hear it?

A: No, that is not a fact.

(364)

The only questions asked of White concerning special jail conditions were directed at his confinement in Westchester County Prison, not Sing Sing (333-334)

The Absence of Counsel at the April 10 Proceedings

Appellant Hilton's trial counsel, Robert Bloom, started a murder trial in the Manhattan Supreme Court in People v. Torres in January, 1975. That trial was still proceeding on March 26, 1975, when Bloom received a letter from Judge Mishler's chambers informing Bloom that the hearing ordered by this Court would be held on March 31 at 10:00 A.M. On March 27, Bloom replied to the Judge, explaining his active engagement and his estimation of the probable end of that engagement.

> I would respectfully request that the hearing be delayed until I have completed my immediate obligation in the state court. I estimate that I will be finished in the State Court in two or three weeks. It may be, however, that there may be an odd day within these two or three weeks which will find me free to participate in the hearing in the instant case.
>
> (Bloom's letter of 3/27/75)

A series of telephone interchanges then took place between Bloom and Judge Mishler's chambers. The judge at first set April 18 as the date for the hearing, but since this was a Friday, Mr. Hilton's day of Sabbath worship, Bloom suggested that a different date be set. He suggested that April 10 might be a convenient date depending on the termination of the Torres trial, and he understood that this date was tentatively set, and that he would keep the court informed of the progress of the Torres trial. Bloom did not understand the 10th to be a firm commitment; he never assented to that date as a firm commitment because he had no way of knowing whether the Torres trial would be concluded by that date; and nobody told Bloom that the 10th was a firm commitment. Bloom was not told of the special arrangements made by the prosecutor to secure witnesses for that date (Bloom letter of

4/17/75; minutes of May 2, 1975 at 19, 25,26).

On March 31, after the interchanges between Bloom and Judge Mishler's chambers had established that no hearing would be held on March 31 and that the hearing was tentatively scheduled for April 10, a judgment of acquittal was rendered to Bloom's client in the Torres case. Bloom had been relieved by that time of any obligation to appear befire Judge Mishler on March 31. It was the understanding of all parties in the Torres trial that, due to the trial inexperience of Michael Ratner, defendant Bell's lawyer in the Torres case, Bloom "would be in this case to the conclusion which was what happened." (minutes of May 2, at 17-18). Bloom was retained as Bell's co-counsel and he continued with the trial.

On the morning of April 10, the tentative hearing date, the jury was deliberating in the Torres trial, and Judge Greenfield directed counsel to be immediately available (Id. at 24). Bloom called Judge Mishler's chambers and informed the Court of the state of affairs in the Torres trial. He called a second time in the afternoon and informed the Court that the jury was still out and that he could not possibly appear for the Hilton hearing. The jury returned a verdict of guilt in the Torres trial at 4:10 P.M. on April 10; Judge Mishler had concluded the Hilton "hearing" at 3:42 P.M.

At the start of the Hilton proceedings, Judge Mishler asked appellant Hilton if he was ready and if he desired the appointment of another attorney (minutes of 4/10/75 at 7).

> HILTON: It's obvious Mr. Bloom is in Manhattan with a jury waiting to find out the verdict. He's not here and I'm not taking another lawyer.
>
> THE COURT: We'll proceed anyway.

 (Ibid)

The proceedings were conducted without even a semblance of cross-examination by the Court on behalf of Hilton. On the contrary, the Court coached the government ("if you can just point out to the court the material in this letter, it would be helpful. At least your claim that it was given, at least once." (Id. at 19); "Doesn't administrative segregation give him access to others held in some kind of security within the prison" (37)); the Court permitted an off-the-record conference between the prosecutor and the witness, former AUSA Truebner, in the middle of the examination of the witness (41); the Court permitted hearsay testimony (39,42) and the court, while recognizing that there was a right to cross examination on Hilton's behalf, was satisfied when Hilton himself, obviously not a lawyer and certainly unaware of the complex legal issues involved in these particular proceedings, had no questions for the government witnesses (31, 43, 45). Indeed, in its decision of May 2, 1975, the Court ascribes to this Court the permission to conduct the hearing in the absence of counsel on behalf of Hilton (slip op. at 13). The Court also found that, "there was little that defense counsel could have added," once the government evidence was received, thus indicating how little value he placed on the adversary process. (Id. at 14).

On April 11, the Court sent Bloom a letter informing him of the proceedings and ordering briefs by the 18th. On April 17, Bloom replied in a letter requesting that the ex parte proceedings be declared a nullity and criticizing the court for its disregard of appellant's right to counsel. On April 21, the court wrote Bloom accusing him of "insolence" and ordered him to appear before the court on May 2, 1975. Bloom appeared on May 2, and the preceding events were discussed. The court rendered its decision on that day.

ARGUMENT

POINT I

THE GOVERNMENT'S SUPPRESSION OF EVIDENCE OF AVON WHITE'S MOTIVES, STATE OF MIND AND LIES AT OR ABOUT THE TIME OF TRIAL, WHICH EVIDENCE REVEALS A PRESENT AND REPEATED PATTERN OF FAKERY AND PSYCHOTIC BEHAVIOR AND TRADE-OFF OF TESTIMONY AGAINST APPELLANT IN ORDER TO GAIN FAVORABLE PRISON CONDITIONS, DESPERATION OVER CONTINUED INCARCERATION IN STATE PRISON AND DESPERATE DEPENDENCY ON THE GOVERNMENT'S PROMISE OF TRANSFER TO FEDERAL DETENTION AND CONSEQUENT WILLINGNESS TO GIVE TESTIMONY HE KNEW WAS COVETED BY THE GOVERNMENT, REQUIRES A NEW TRIAL.

The White-Clarey (Truebner) letter of February 8, 1974 is substantial evidence that White was lying at trial when he testified that he was cured of the kind of behavior exhibited by him in 1968-1969 when he faked insanity to his doctors, or actually believed his own fantasies of omnipotence and amoral superiority, in order to gain special treatment from prison authorities. The letter reveals White engaged in the exact same behavior in 1974, five months prior to trial. Here was White again in the same circumstances that resulted in a medical diagnosis of insanity in 1968:dissatisfaction with his prison conditions and the use of either the faked excuse of mental breakdown or the reality of mental breakdown to gain special privileged conditions for himself. It had worked well in 1968, and in 1974, he had the extra leverage of his Hilton testimony. The letter showed his willingness in 1974 to lie to gain special treatment from government authorities, a devastating fact for a jury having to judge the credibility of his testimony against Freddie Hilton.

The letter reveals that in 1974, just as in 1968, White was treading that thin line between faked insanity and actual insanity, perhaps not sure himself what was his true state of mind. The letter reveals that just as the truth about his state of mind in 1974 was suspect, so the truth of what facts came from that mind were suspect.

But, the defense counsel, and hence the jury, did not have this evidence of the 1974 repeat of the psychotic or semi-psychotic behavior and state of mind. The jury heard only the evidence of one "psychotic episode" in 1968-1969, and, despite counsel's efforts to show a continuing present pattern, the government was able to argue that this episode was many years ago when White was 16 and that according to the Matteawan recovery report and White's own testimony, he was cured. The letter refutes this; it shows a pattern and an updated behavioral example of the 1968 state of mind. And, it shows that White lied at the trial. There he testified he would not lie any more to obtain a better prison deal for himself (See Statement of Facts, supra); yet the letter, together with his testimony at the April 10 proceedings shows that he did lie once again in 1974 in the letter to get a better prison deal. In the letter he wrote,

> I am being held in solitary confinement and I am on the verge of having a nervous breakdown and I am desperately in the need of your help...

At the April 10 proceedings, he testified first that he never wrote he was having a "nervous breakdown", and then that if he did write these words, they were not true because he suffered no ill effects from solitary confinement, just inconvenience. The words were written only because he, "couldn't get no kind of --

no kind of privileges or nothing." (56-57) Hence, the letter was a lie which gives the lie to his trial testimony that he would no longer lie to gain better prison conditions. The prosecutors themselves gave little or no credence to White's "desperate" cry for help. When Clarey received the letter, he says, he filed it away and did nothing about it. Truebner said he was going to try and do something, but, after meeting some resistance, he never did. If the letter was the truth, the government's main witness in all these trials was in agony, cracking up in solitary, and they left him there writhing.

But even if it was true, if White was really having some sort of nervous breakdown at Sing Sing, several other lies and important inferences flow from the fact unknown to counsel and jury during the trial. White testified at trial that he was getting Valiums at Sing Sing only to calm himself down, ostensibly for nerves during testimony, and that only his prospective sentences were bothering him while at Sing Sing, and that his mental troubles were over in 1969 when he "grew up" and "realized that stuff was a fantasy". (310-312) If the letter was the truth, all this testimony was a lie, because this letter describes the present shakiness of his mental condition and his desperate need for help to get out of Sing Sing. He was having a breakdown over something other than his prospective sentences; he was having a breakdown over the same kind of conditions that rendered him insane in 1968. If the letter was the truth, he was lying in his sworn testimony on April 10 that he suffered no ill effects

from the solitary confinement.

An important inference could have been drawn at the trial had the evidence of an actual desperate White in the throes of nervous breakdown been revealed. One of the promises made to White was that the prosecutors would attempt to arrange his incarceration on all the charges in federal prisons. At the time of the letter, the trial in the instant case was four or five months away, and White was also due to testify in other State and Federal cases. A technique to insure that White would not balk anywhere along the line, as his letter of February 8 indicated he might, was to have him experience a good dosage of life in State prison while telling him that it would take time, but a transfer to federal prison would be effected. This promise would then seem more and more substantial to White as the months in Sing Sing wore on, and the prospect of losing it that much more impossible for him to bear.

Regardless of any design on the part of the government, the effect of their withholding of assistance to this desperately anxious man was the same; that promise of transfer to federal detention in the mind of White, therefore, takes on a much greater significance than it did at the trial, and the jury should have known this in order to judge the extent to which White would go to achieve this consideration.

The government had argued at trial that on the basis of White's testimony, the complete understanding between White and the government had been laid before the jury -- namely the two guilty pleas to cover some, but not all, of the outstanding indictments against him, the promise to get him the time in

federal pens, but no sentence promises. Thus, White was not getting that much consideration, and there was no special motive to lie and name Hilton. This state of affairs as presented to the jury was a lie according to the letter and the Truebner response to it. In addition to illustrating the real importance to White of the promise of federal time, the letter reveals an ongoing relationship of trade-off between White and the government, in which other promises were made, but hidden from the jury. Truebner's written response to White's letter made a promise to White which was not revealed at the trial. Truebner's letter clearly promises government action to get White o t of Sing Sing sometime "in the near future." It is interesting to note also that a third bank robbery indictment was added to those covered by his federal plea at about the same time as the letter. Thus, White got action with this letter, an expectation of transfer prior to sentence, leverage from the testimony he had to offer against Hilton. * Counsel had attempted to examine him on the full extent of his agreements with the government (319-320) and on whether he understood that his testimony against Hilton was of special importance to the government. At trial, White, remembering the letter, lied and said the pleas were all there was to his agreements , and he was equivocal about the government's desire for testimony

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*Although it is true that White testified at the 4/10/75 proceedings, that he didn't think the government could do anything for him while he was in State custody, the letter and Truebner's response belies this assumption. In any case, the trial jury should have been able to come to its own conclusion on the basis of a full set of facts. In addition, White was ultimately transferred out of Sing Sing sometime after his testimony against Hilton. The Judge at the 4/10/75 proceedings prohibited him from telling where.

against Hilton and what he could get for it (339, 340, 342, 345, 364). However, the letter itself says it in very clear terms:

> I am ready to go with you this time on the Government vs. Hilton and I will continue to do so as long as I know that People are trying to help me. I won't let you down when you need me so dont [sic] let me down now cause I really need you now.

This passage in the letter is crucial to any fair estimation of the truth of White's testimony, because it, like no other impeaching evidence in the case, states in no uncertain terms that White was testifying purely for the quid pro quo. United States v. Sperling, 506 F. 2d 1323 (2d Cir., 1974); United States v. Pacelli, 491 F. 2d 1108 (2d Cir., 1974). This motivation, together with the lies established by the letter, would render White's testimony totally unworthy of belief.

Thus, the White-Clarey (Truebner) letter is not merely cumulative evidence; it is evidenc of White's state of mind and and motivations close to the time of the trial, the absence of which evidence at trial was capitalized upon by the prosecutor in his argument that White might have been a liar and a madman when he was an adolescent in 1968, but he and Matteaway said he was cured in 1969. This letter was evidence that vitally concerned the motivation of the witness in 1974, and it was evidence of promises made but unrevealed at trial. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). This evidence reveals entirely new facts about White's mind and motivations which were not before the jury in any form at the trial. This is evidence that White lied at the trial, that to him his sanity depended on transfer to a

federal prison, that he was in that same dim mind area between insanity and duplicity as in 1968, and that he would do anything, including lying and going insane to obtain better prison conditions for himself. United States v. Sperling, 506 F.2d 1323 (2d Cir., 1974); United States v. Seijo and Hildebrandt, Slip. Op. (2d Cir., decided 4/23/74) cf. United States v. Rosner, Slip. Op. (2d Cir., 4/29/75), Docket No. 74-2290).

A new trial is further mandated, because this is a case where the government's suppression of the evidence cannot be excused as inadvertant. For all the reasons outlined above, a prosecutor who was attuned to the decisions of this Court and to his obligations to the defense, could not but regard this letter as important Brady or 3500 material. This letter was known to at least two U.S. Attorneys in two separate cases, and, although one of those took definite action with respect to it, to the extent of contacting other prosecutors and White's attorney, somehow neither defense counsel on neither of the two cases was ever notified of the letter. Clarey said he did nothing with the letter but White testified that the case agent, McCartin, visited White and told him that Clarey had received the letter. AUSA Clarey testified that he went through his files prior to trial, and during the trial the record indicates that he represented to defense counsel, in response to defense counsel request, that he would go through his files once more in search of any other possible 3500 material, His testimony was that "it never occurred" to him to turn this letter over, not that he did not realize it was there. The trial record indicates that

he also forgot other letters, but remembered in the nick of time in the middle of counsel's cross-examination of White, when issues relating to other letters were raised. It was also Clarey who "forgot" to preserve the evidence of Professor Edgar's failed identification on the day after the car theft and then represented to the Court at trial that he would make no attempt to see that such omissions did not happen again. (See Main Brief, Point II). It is strange that Clarey, who supposedly saw the letter in his various file searches, "forgot" to turn it over, when Stephen Behar, of the same office, "learned"of the letter while preparing this appeal and immediately recognized its importance. As in Sperling, supra at 1333,

> Materials as dramatic as the Morvillo and Feffer letters are not like FBI reports lying around in files which a prosecutor could well forget....[Prosecutors] must have been aware how useful to the defense Lipsky's letters would have been....

To call the conduct of Truebner and Clarey "inadvertant" with respect to this letter is to strain the credulity of this court. At the very least, their conduct was in reckless disregard of their prosecutorial obligations, an illustration of the low priority given by prosecutors to this Court's mandates in effectuation of Brady and the Jencks Act. Two prosecutors saw this letter, and had dealings with it, knew about it and filed it, but neither of them took any steps to insure against their "forgetting" to turn it over. In addition, the knowledge they are charged with having from a reading of the letter should have enabled them to recognize the perjury of White when he testified

at trial that his faking and mental troubles were over in 1969, that he had no other agreements with the government or expectations of assistance, that the only thing troubling him at Sing Sing was what his sentences would eventually be, and that he was only naming Hilton because it was the truth. The government knew or should have known of the contrary evidence; the facts were in their possession, and they either deliberately suppressed them or ignored them and a new trial is necessary. United States v. Kahn, 474 F. 2d 272, 287 (2d Cir., 1973) cert. den. 411 U.S. 982 (1973); United States v. Seijo and Hildebrandt, supra; Alcorta v. Texas, 355 U.S. 28 (1957)

Nor can it be argued successfully that White's testimony was not necessary to appellant's conviction on the conspiracy, or that other evidence so corroborated White on that count that the absence of this impeaching evidence was harmless. The jury obviously had had a lot of trouble with White's testimony, the only evidence placing appellant in the actual bank robbery. Indeed, the jury acquitted appellant of both substantive bank robbery offenses. With the February 8 letter before them exposing the White lies (no pun intended) and exposing the White state of mind at Sing Sing in 1974 mirroring his 1968 psychotic episode, the jury may well have acquitted appellant of the conspiracy. White provided the only evidence that appellant's participation in the earlier car theft was with the knowledge and intention that the car would later be used in the robbery. There was no corroboration of this White testimony as to appellant's knowledge and intention during the car theft. The fact that the

car owner identified appellant as a participant in the earlier car theft (See Main Brief, Point II) does not corroborate White as to appellant's knowledgeable participation in the conspiracy to rob the bank a day later. As the trial judge conceded in his decision of May 2, 1974, denying a new trial, "The testimony of Avon White was vital to the government's case against the defendant." (slip. op. at 5) The car owner's identifcation was only corroboration so long as the jury had a scintilla of belief in White and so long as they heard all the other improper evidence of appellant's bad character, other crimes and post-arrest admission of desire to shoot the arresting officer. Without this other purely inflammatory material (See Main Brief, Point I) and without belief in White to any extent, the jury would not have convicted appellant on the testimony of the car owner alone (especially if appellant had had available the impeaching evidence of the car owner's failed identification the day after the car theft, which evidence was also suppressed by the government (See Main Brief, Point II)).

For all of the above reasons, and on the reasons stated in the main brief, and on the basis of the evidence so far developed, this Court should order a new trial in this case. At the very least, however, the District Court's conduct of the April 10 proceedings ex parte, in the face of this Court's order for a hearing, demands a remand to a different District Court Judge for a full, fair and adversary examination of these issues. There can be no question that defense counsel made a justifiable request for a delay of the hearing since he was on trial awaiting a

verdict in another case (See Statement of Facts, supra) . He was always courteous in keeping the court well informed of his whereabouts and the reasons for his inability to appear for the hearing. There can be no question of the legitimacy of counsel's obligation in People v. Torres. When his first client was acquitted at the close of the People's case on March 31, he became co-counsel to Herman Bell pursuant to the initial understanding among all defendants and counsel from the very beginning of that case . (See Statement of Facts). And, contrary totthe District Court's contorted recitation of the facts,by March 31 , the tentative date of the hearing in this case had already been put forward to April 10. Counsel had no reason to believe on March 31 that he had any other obligation as an attorney other than, as agreed upon by the parties in Torres, to continue in the case to protect the rights of a client who, in Bloom's absence, would have been represented by another attorney without any prior trial experience. On March 31, the hearing date having already been put forward to April 10, Bloom was under no direction to appear before Judge Mishler. Therefore, having assumed the obligation of representation of Mr. Bell on March 31, and having been directed to be available during the jury deliberations on April 10, Mr. Bloom quite properly informed the Court that he could not appear for the hearing on that date. Thus, it was not Bloom, but the District Court's "myopic insistence upon expeditiousness in the face of a justifiable request for delay" (Ungar v. Sarafite, 376 U.S. 575. 589 (1964)),

and the District Court's astonishing misconstruction of this Court's order as permitting an ex parte determination (See Court's opinion at 13) and the District Court's preconceived judgment of the issues in the government's favor exhibited by its opinion that, "there was little that defense counsel could have added" (Id. at 14), that caused appellant to be without counsel at an obviously "critical stage" in the criminal proceedings against him. Hamilton v. Alabama, 368 U.S. 52,54 (1961); Kirby v. Illinois, 406 U.S. 682 (1972); Stovall v. Denno, 388 U.S. 293 (1967).

Judge Mishler was loathe to transfer the hearing to another judge, despite his own heavy calendar which caused this scheduling problem. Undoubtedly, he was so disposed to keep the case because a detailed knowledge of the trial facts was necessary to a determination of these issues. For the same reason, the Judge's offer to assign a totally new attorney for Hilton on April 10, was ridiculous. The resultant hearing without Mr. Bloom was a farce (See Statement of Facts, supra, for a discussion of how it was conducted without any attempt at representation for Mr. Hilton's side of the story). This Court should therefore give no weight to the findings of the Court below, which are, as argued, against the weight of the evidence in any case.

CONCLUSION

FOR THE ABOVE STATED REASONS, AND FOR THE REASONS STATED IN APPELLANT'S MAIN BRIEF, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, AND A NEW TRIAL ORDERED, OR, ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR A HEARING BEFORE A DIFFERENT JUDGE.

Respectfully Submitted,

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